IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

CASE NO. 17-765

UNITED STATES OF AMERICA,
Petitioner,

-vs-

VICTOR J. STITT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent provides that he is an individual.

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The en banc opinion of the Sixth Circuit Court of Appeals is reported at 860 F.3d 854, and reproduced at Pet. App. 1a-55a. The panel opinion from the Sixth Circuit Court of Appeals is found at 637 F. App'x 924 and reproduced at Pet. App. 56a-64a.

STATUTES INVOLVED

The relevant statutes are reproduced at Pet. App. 65a-80a.

STATEMENT OF THE CASE

Victor Stitt was convicted by jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 924(g). At sentencing, the district court found Mr. Stitt to have at least three prior convictions which qualified as violent felonies under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Having been classified as an ACCA, Mr. Stitt's statutory penalty for his offense increased from a ten-year maximum to a fifteen-year mandatory minimum term of incarceration. The district court sentenced Mr. Stitt to 290 months in prison and Mr. Stitt appealed. (Cert. Pet. App. at 57a-58a).

On appeal, Mr. Stitt argued that none of his prior convictions qualified as violent felonies under the ACCA. The government conceded this Court's decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), prohibited certain prior offenses from being qualifying predicates. Therefore, the issue on appeal was limited to whether Tennessee's aggravated burglary statute qualified as a violent felony under the ACCA statute. (Cert. Pet. App. at 62a). The Sixth Circuit, relying on its

own precedent, held Tennessee's aggravated burglary statute is categorically a violent felony under the ACCA's enumerated-offense clause. (Cert. Pet. App. at 64a).

Mr. Stitt filed a motion for a rehearing en banc, arguing an inter-circuit conflict. The Sixth Circuit had previously held Tennessee's aggravated burglary statute was categorically a violent felony but had "reached the opposite conclusion about Ohio's similarly worded burglary statute." (Cert. Pet. App. at 1a-2a). The Sixth Circuit granted Mr. Stitt's motion for a rehearing to resolve this conflict.

The government initially conceded Tennessee's aggravated burglary statute covered more places than "buildings or structures." It argued, however, that the aggravated burglary statute was divisible and therefore the modified categorical approach applied. While in the en banc briefing stage, this Court issued its decision in *Mathis v. United States*, __ U.S. __,136 S. Ct. 2243 (2016). The government then changed its position and argued Tennessee's aggravated burglary statute is not divisible but meets this Court's definition of "building or structure" because the vehicles and moveable enclosures are required to be adapted for overnight accommodations. (Cert. Pet. App. at 5a, fn. 1).

The majority of the Sixth Circuit rejected the government's position, finding "the government's arguments * * * ignore the [Supreme] Court's clear and unambiguous language that 'building or other structure' excludes *all* things mobile or transitory." (Cert. Pet. App. at 8a) (emphasis in original). "[T]he Supreme Court has held fast to the distinction between vehicles and movable enclosures versus buildings and structures in every single post-*Taylor* decision." (Cert. Pet. App. at 6a).

"Th[is] Court's adherence to this distinction over the course of nearly thirty years persuade[d] [the Sixth Circuit] that the Court meant exactly what it said: vehicles and moveable enclosures fall outside the scope of generic burglary." (Cert. Pet. App. at 6a-7a).

The dissent concluded Tennessee's aggravated burglary statute fell within the generic definition of burglary because its locations "match the traditional meaning of 'dwelling'" and that "*Taylor* tells us that burglary of a dwelling is always generic." (Cert. Pet. App. at 46a-47a). The majority and both concurring opinions rejected the dissent's rationale and conclude that *Taylor*, and its progeny, require the conclusion that Tennessee's aggravated burglary statute is broader than generic burglary. (Cert. Pet. App. at 1a-43a).

REASONS FOR DENYING THE WRIT

I. This Court has already defined generic burglary to exclude vehicles and moveable enclosures.

This Court should deny certiorari in this case because it has already defined generic burglary to exclude vehicles and moveable enclosures. Burglary under the Armed Career Criminal Act ("ACCA") was initially defined by statute. The ACCA of 1984 defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense." *Taylor v. United States*, 495 U.S. 575, 581 (1990) (quoting 18 U.S.C. § 1202(c)(9) (1984)). In 1986, the ACCA was amended and the definition of burglary was deleted. *Taylor*, 495 at 582. In 1990, this Court was called upon to define burglary as used in the ACCA. *Taylor*, 495 U.S. 575.

In constructing the definition, this Court reviewed the ACCA's pre-1986 statutory definition of burglary, Congress' changes to the ACCA statute, the legislative history related to the 1986 amendment, and the "modern 'generic' view of burglary in a majority of the States' criminal codes at the time of the 1986 amendment." *Taylor*, 495 at 582-590. This Court noted, "the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Taylor*, 495 at 589-590. Nonetheless, the Court held that Congress intended the term burglary "in the generic sense," and that the generic meaning "is practically identical to the 1984 definition." *Taylor*, 495 at 598.

After discussing the traditional common law definition, the Model Penal Code, a prominent criminal law treatise, and various states' criminal codes, this Court

defined generic burglary as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 at 592-599. The Court further held that burglary statutes that include places other than buildings, "such as automobiles and vending machines," are broader than generic burglary. *Taylor*, 495 at 599.

Throughout the years since *Taylor*, this Court has maintained the exclusion of vehicles and moveable enclosures from the definition of generic burglary. *Mathis v. United States*, __ U.S. ___, 136 S. Ct. 2243, 2250 (2016) (Iowa's burglary statute "covers more conduct than generic burglary" because it "reaches a broader range of places: 'any building, structure, *[or] land, water, or air vehicle*.'" (alteration in original) (citations omitted)); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (noting that "breaking into a building" would qualify as generic burglary, but breaking into a "vessel" would not); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186–87 (2007) (noting that Massachusetts defines burglary to include breaking into a vehicle, "which falls outside the generic definition of 'burglary,' for a car is not a 'building or structure'" (citations omitted)); *Shepard v. United States*, 544 U.S. 13, 15–16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle.").

The government argues that this Court must have meant to include vehicles and moveable enclosures that have been adapted for overnight accommodations in its definition of generic burglary because the "overwhelming majority of states included

vehicles and moveable enclosures in their burglary statutes." (Cert. Pet. at 6). This statement is misleading.

II. The question presented is not worthy of Supreme Court review.

Assuming without conceding that the chart submitted by the government is an accurate recounting of state burglary statutes at the time *Taylor* was decided, (Cert. Pet. App. at 81a-97a), ruling in the government's favor on the issue presented would bring only a handful of states' burglary statues within the definition of generic burglary.

According to the government's chart, forty-four states include vehicles and/or moveable enclosures in their burglary statutes. However, the majority of those states do not limit the inclusion of vehicles and/or moveable enclosures to ones that are adapted for the overnight accommodation of persons. Nineteen states have burglary statutes that include vehicles and/or other moveable enclosures without any use limitation. [1] Of the remaining twenty-five states, most include vehicles and/or moveable enclosures that have some other purposes, like carrying on a business,[2] business transportation,[3] where people assemble for the purposes of business,[4] or are

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[1] California, Connecticut, Delaware, Florida, Idaho, Kansas, Louisiana, Massachusetts, Nevada, New Mexico, Oklahoma, South Dakota, Wisconsin, Wyoming

[2] Alabama, Alaska, Arkansas, Colorado, Iowa, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington

[3] Arizona

[4] Arkansas, Kentucky, Iowa, Missouri, South Carolina

used to store, transport, or sell goods or merchandise.[5] In reality, only six states have statutes that would be included in the government's expanded definition of generic burglary.[6] Thus, the government's argument that this Court must have meant to include vehicles and moveable enclosures that have been adapted for overnight accommodations in its definition of generic burglary because the "overwhelming majority of states included vehicles and moveable enclosures in their burglary statutes," is flawed. (Cert. Pet. at 6). The government's argument fails to recognize that the majority of states' burglary statutes do not limit the inclusion of vehicles and moveable structures to only those locations adapted for the overnight accommodations of persons.

Notably, one of the state statutes that may be included in the proposed expanded definition is Texas. Yet, this Court specifically reviewed Texas's burglary statutes when it held vehicles were outside the definition of generic burglary. *Taylor*, 495 at 591 (citing Tex. Penal Code Ann. §§ 30.01-30.05 (1989 and Supp. 1990)). Because this Court has already defined generic burglary to exclude vehicles and moveable enclosures, and has consistently maintained this definition throughout the seventeen years since *Taylor*, certiorari should be denied.

III. There is no mature circuit split at this time.

Additionally, the government's petition for certiorari in this case should be denied because there is no mature circuit split on this issue.

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[5] Iowa, Mississippi, South Carolina, Washington

[6] Georgia, Hawaii, Maine, Minnesota, Texas, and West Virginia

In 1996, the Tenth Circuit held Texas's burglary of a habitation statute qualified as generic burglary. *United States v. Spring*, 80 F.3d 1450, 1461-62 (10th Cir. 1996), *cert. denied*, 519 U.S. 963 (1996). Texas, by statute, defined habitation as "a structure or vehicle that is adapted for the overnight accommodation of persons." *Id.* at 1462. The Tenth Circuit held that because the statute only covered vehicles adapted for the overnight accommodation of persons, it fell within this Court's definition of generic burglary as defined in *Taylor*. In reaching its conclusion, the Tenth Circuit relied entirely on two cases: *United States v. Silva*, 957 F.2d 157 (5th Cir. 1992), and *United States v. Sweeten*, 933 F.2d 765 (9th Cir. 1991). *Sweeten* is no longer good law and *Silva* has been called into question with the Fifth Circuit's recent grant of a rehearing en banc. Additionally, the Tenth Circuit's *Spring* decision is inconsistent with its decision in *United States v. Scoville*, 561 F.3d 1174 (10th Cir. 2009), *cert. denied*, 588 U.S. 888 (2009).

The Ninth Circuit overruled *Sweeten* in *United States v. Grisel*, 488 F.3d 844, 851, fn. 5 (9th Cir. 2007) (en banc), *cert. denied*, 552 U.S. 970 (2007). In *Grisel*, the Ninth Circuit conducted a thorough review of this Court's decision in *Taylor* and recognized that "*Taylor* jettisoned analyzing the *use* of an object in favor of analyzing the *nature* of the object when it adopted an express definition of burglary that is limited to the breaking and entering of building * * * ." *Id.* Unlike in *Sweeten*, the Ninth Circuit had the benefit of *Shepard v. United States*, 544 U.S. 13 (2005), when it decided *Grisel*. In *Shepard*, this Court reiterated that the Armed Career Criminal Act "makes burglary a violent felony if committed in a building or enclosed space

('generic burglary'), not in a boat or motor vehicle." *Shepard*, 544 U.S. at 15-16. *Grisel* is the controlling law in the Ninth Circuit and is in line with the Sixth Circuit's decision in *Stitt*.

Additionally, the Fifth Circuit has recently granted a rehearing en banc in *United States v. Herrold*, 685 F. App'x 302 (5th Cir. 2017), *reh'g en banc granted*, 693 F. App'x 272 (July 7, 2017). The issue presented for rehearing is whether Texas's burglary of a habitation is a generic burglary and a qualifying predicate for the ACCA. (No. 14-11317, Splmt En Banc Brief Dkt. 00514109999). This is the same Texas burglary statute at issue in *Silva, Spring,* and *Sweeten*. Thus, the Fifth Circuit's decision to grant a rehearing en banc in *Herrold* raises the question of whether *Silva* remains good law.

Without *Sweeten* and *Silva*, the Tenth Circuit's decision in *Spring* is without support. *Spring* was decided in 1996, prior to this Court's decisions in *Shepard, Nijhawan, Duenas-Alvarez, Descamps*, and *Mathis*. Moreover, *Spring* is in conflict with another case from the Tenth Circuit. In 2009, the Tenth Circuit issued a decision in *United States v. Scoville*, 561 F.3d 1174 (10th Cir. 2009), *cert. denied*, 588 U.S. 888 (2009). The court's analysis in *Scoville* conflicts with *Spring*.

In *Scoville*, the Tenth Circuit held, "*Taylor* instructs that a statute that includes structures 'such as automobiles and vending machines, other than buildings' is broader than generic burglary." *Id.* at 1177. The issue presented in *Scoville* was whether Ohio's burglary statute was within the generic definition. Ohio burglary included "houses, buildings, vehicles, and other structures that are occupied as a

dwelling or habitation, that are adapted for the overnight accommodation of persons, or in which a person is present or likely to be present." *Id.* at 1179. The Tenth Circuit held Ohio's third-degree burglary statute was broader than generic burglary as defined in *Taylor*. *Id.* at 1179. *Scoville* and *Spring* create an intra-circuit conflict, and should be addressed by the Tenth Circuit.

The Sixth Circuit recently corrected an intra-circuit split on the same issue. In *Coleman*, the Sixth Circuit held, "Ohio's third-degree burglary statute sweeps more broadly than generic burglary because it 'include[es] places, such as automobiles and vending machines, other than buildings." *United States v. Coleman*, 655 F.3d 480, 482 (6th Cir. 2011), *cert. denied*, 565 U.S. 1129 (2012). Ohio's third-degree burglary covered locations "maintained as a permanent or temporary dwelling," "occupied as the permanent or temporary habitation of any person," was "specially adapted for the overnight accommodations of any person," or where "any person is present or likely to be present." *Id.* at 482. The analysis in *Coleman* conflicted with the Sixth Circuit's analysis of Tennessee's aggravated burglary statute. *See, e.g., United States v. Nance*, 481 F. 3d 882 (6th Cir. 2007). The Sixth Circuit accepted *Stitt* en banc to correct this intra-circuit conflict. *See United States v. Stitt*, 860 F.3d at 854 (6th Cir. 2017). The Sixth Circuit now consistently holds that burglary statutes that include vehicles and moveable enclosures are outside the definition of generic burglary, even if the statutes require the various locations to be adapted for the overnight accommodations. *See Stitt*, 860 F.3d 854 at 857-861.

Despite having numerous opportunities to do so, this Court has never reframed the definition of generic burglary to look at the intended use of the location and the majority of the Circuits have consistently followed suit. The Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits hold that the "definitional focus is on the nature of the property or place, not the nature of its use at the time of the crime." *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010), *cert. denied* 562 U.S. 1161 (2011), *abrogated by Descamps v. United States*, 133 S. Ct. 2276 (2013).

In *Rainer*, the Eleventh Circuit held Alabama's third-degree burglary statute was broader than generic burglary. This burglary statute provided that: "[a] person commits the crime of burglary in the third degree if he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." *Rainer*, 616 F.3d at 1214 (citing Ala.Code § 13A-7-7 (1979)). Alabama law defined "building" to include vehicles, aircraft, or watercraft if those objects were used "for the lodging of persons or carrying on business therein." *Rainer*, 616 F.3d at 1215 (citing Ala.Code § 13A-7-1(2) (1979)). The government argued, "that the definition's conditional clause narrows the burglary statute's sweep to generic burglary." *Id.* at 1215.

The Eleventh Circuit rejected this argument and held "[t]he conditional clause does not limit the statute's sweep to generic burglary." *Id.* at 1215.

> Even if used "for the lodging of persons or carrying on business therein," *see* Ala.Code § 13A-7-1(2) (1979), vehicles, aircraft, and watercraft are not "building[s] or structure[s]" in the generic burglary sense. *See Taylor*, 495 U.S. at 599-600; *Shepard*, 544 U.S. at 15-16. The definitional focus is on the nature of the property or place, not on the nature of its use at the time of the crime.

Rainer, 616 F.3d at 1215. *See also United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016) (holding South Carolina's burglary of a "dwelling" is not generic burglary because it covers boats and vehicles); *United States v. Howard*, 742 F.3d 1334, 1347-1349 (11th Cir. 2014) (finding Alabama's third degree burglary statute non-generic and indivisible).

The Third Circuit has held that the inclusion of vehicles in a burglary statute, even if the vehicles are adapted for the overnight accommodations or for business, makes the statute broader than generic burglary. *United States v. Bennett*, 100 F.3d 1105, 1109 (3rd Cir. 1996). "The inclusion of 'any vehicle' in the statute demonstrates that the legislature did not intend to limit this statute to buildings." *Id.* (quoting *Commonwealth v. Hagan*, 539 Pa. 609, 654 (1995)).

The Fourth Circuit rejected the government's argument that Maryland's first-degree burglary statute qualified as a generic burglary because it only included places where a person resides and sleeps. *United States v. Henriquez*, 757 F.3d 144, 149 (4th Cir. 2014). The Fourth Court held that because "there is a realistic probability that Maryland's statute covers burglaries of motor vehicles or boats-places that the United States Supreme Court has expressly excluded from generic burglary," the statute swept more broadly than generic burglary. *Id.* at 146. *See also United States v. White*, 836 F.3d 437 (4th Cir. 2016) (West Virginia's burglary of a dwelling house is not generic burglary because it includes self-propelled motor homes.).

The Eighth Circuit has held that Arkansas's burglary of a "residential occupiable structure" is not a generic burglary. *United States v. Sims*, 854 F.3d 1037

(8th Cir. 2017). Under Arkansas state law, a "'[r]esidential occupiable structure' means a vehicle, building, or other structure: (i) [i]n which any person lives; or (ii) [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present." *Id.* at 1039 (quoting Ark. Code Ann. § 5-39-101(4)(A)). *See also United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017) (holding Wisconsin's burglary of a motor home, whether or not someone was living in the motor home, is broader than generic burglary).

The Ninth Circuit, sitting en banc, held that Oregon's second-degree burglary is broader than generic burglary because it covers non-buildings. *Grisel*, 488 F.3d at 850. "Under Oregon law, '[b]uilding,' *in addition to its ordinary meaning*, includes any *booth, vehicle, boat, aircraft* or other structure adapted for overnight accommodation of person or for carrying on business therein. Or.Rev.Stat. § 164.205(1) (emphasis added)." *Grisel*, 488 F.3d at 850 (internal citations omitted). Oregon courts have held the term building includes "a semi-truck trailer being used to collect charitable donations" and "a fishing vessel." *Id.* at 850-851. "Trailers and boats are not buildings in the ordinary sense of the word – they are not constructed edifices intended for use in one place." *Id.* at 851. The majority of the Ninth Circuit rejected the argument that non-buildings adapted for the overnight accommodation of persons qualifies as generic burglary. *Id.* at 851, fn. 5. *See also United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016). The Ninth Circuit has also held that Tennessee's aggravated burglary statute is broader than generic burglary. *United States v. Moncrief*, 356 F. App'x 11 (9th Cir. 2009).

Besides *Spring*, the only other case to hold generic burglary includes vehicles and moveable enclosures is *Smith v. United States*, __ F.3d __, 2017 WL 6350072 (7th Cir. Dec. 13, 2017).[7] *Smith* is the only case post- *Shepard*, *Nijhawan*, *Duenas-Alvarez*, *Descamps*, and *Mathis*, to conclude this Court must have intended to include mobile locations in the definition of generic burglary. To reach its conclusion in *Smith*, the Seventh Circuit panel relies entirely on *Spring* and Judge Sutton's dissent in *Stitt*. *Smith* concludes this Court in *Taylor*, and all of its subsequent cases, did not mean what it said when it specifically excluded vehicles and moveable enclosures from generic burglary. The court in *Smith* held that this Court "did not grapple with all enclosed spaces that people may call home," therefore, the Seventh Circuit felt free to construct its own definition. *Smith*, 2017 WL 6350072, at *4.

IV. This case is a poor vehicle to resolve the question presented.

Even if this Court were to conclude *Smith* creates a circuit split on this issue, *Stitt* is not the case to resolve the issue.[8] Assuming for argument's sake this Court were to adopt the government's expanded definition of generic burglary, Tennessee's aggravated burglary statute is still overbroad and cannot be an ACCA predicate.

Tennessee's aggravated burglary statute cannot categorically qualify as a violent felony under the ACCA because the conviction can be based on reckless

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[7] This case was decided after the government filed its petition for certiorari.

[8] A petition for a writ of certiorari in *Smith* was filed on January 17, 2018. Supreme Court No. 17-7517.

conduct. *See Begay v. United States*, 553 U.S. 137, 145 (2008) (negligent or reckless conduct is not sufficient to qualify as a violent felony; the ACCA punishes purposeful, violent and aggressive conduct). *See also Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004) (strict liability of DUI statute precludes statute from qualifying as a crime of violence); *Jones v. United States*, 689 F.3d 621, 626 (6th Cir. 2012) (reckless conduct does not qualify as an ACCA predicate).

"Aggravated burglary [in Tennessee] occurs when a person enters a habitation without the effective consent of the property owner and commits or attempts to commit a felony, theft, or assault." *State v. Adams*, No. M1998-00468-CCA-R3-CD, 1999 WL 1179580, at *6 (Tenn. Crim. App. Dec. 15, 1999) (citing Tenn. Code. Ann. §§ 39-14-402(a)(3)-403(a)). The statute does not require a mental state for entering the habitation. *State v. Snipes*, No. W2011-02161-CCA-R3-CD, 2013 WL 1557367, *9 (Tenn. Crim. App. Apr. 12, 2013) ("burglary statute is silent regarding the required mens rea").

Under Tennessee law, "[w]hen a specific mental state is not given as an element of an offense and is not plainly dispensed with in the offense, the [s]tate must at least prove that the defendant acted recklessly." *Adams*, 1999 WL 1179580, at *6. Tenn. Code Ann. § 39-11-301(c) states that "[i]f the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state."

Moreover, a review of Tennessee's pattern jury instruction for aggravated burglary, the statutes at issue, and the relevant case law, it is clear a mens rea is not

an element that must be pled with specificity. *See State v. Anderson*, No. E2014-00661-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 538, at *55 (Tenn. Crim. App. June 29, 2015), *appeal denied*, 2015 Tenn. LEXIS 993 (Tenn., Nov. 24, 2015) ("The trial court properly instructed the jury that the elements of aggravated burglary are: (1) that the Defendant entered a habitation or any portion thereof; (2) that the Defendant entered with the intent to commit a theft; (3) that the Defendant acted without the effective consent of the owner; and (4) that the Defendant acted either intentionally, knowingly, or recklessly."). *See also* Tennessee's pattern jury instruction 14.02.

Because a conviction for aggravated burglary in Tennessee does not categorically require purposeful or intentional conduct when entering the habitation, it is not a qualifying predicate offense under the ACCA even if this Court were to adopt the government's expanded generic definition to include vehicles adapted for overnight accommodations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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